

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

November 4, 2009 Session

R. G. W. ET AL. v. S. M.

Appeal from the Chancery Court for Fentress County
No. 07-39 Billy Joe White, Judge

No. M2009-01153-COA-R3-PT - Filed December 14, 2009

Father of three children appeals the termination of his parental rights to his youngest child. Petitioners, the child's maternal aunt and uncle, filed this petition to terminate Father's parental rights and to adopt the child. The child's mother consented to termination of her rights and supported the petition to terminate Father's rights. The trial court terminated Father's rights on the grounds of abandonment by willful failure to support and willful failure to visit, and upon the finding that termination was in the child's best interest. We have determined that the trial court applied an erroneous legal standard and that the record does not contain clear and convincing evidence necessary to prove a ground for termination or that termination is in the child's best interest.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Mark Baugh and Ben H. Bodzy, Nashville, Tennessee, for the appellant, S. M. ("Father").

James P. Romer and Melanie Stepp Lane, Jamestown, Tennessee, for the appellees, R. G. W. and S. W. ("Petitioners").

OPINION

The maternal aunt and uncle of the child at issue (hereinafter "the petitioners" or "Mr. or Mrs. W.") filed a Petition to Terminate Mother and Father's Parental Rights and to Adopt in 2005 after the mother of the child, who is the sister of Mrs. W., announced her intention to voluntarily relinquish her parental rights. The child had resided with Mother, and then the maternal grandmother in Fentress County, Tennessee, prior to the petitioners obtaining informal custody of the child in 2006. Father, a resident of New York who lives on social security disability benefits, answered and filed a counter-petition seeking custody of the child. The facts leading up to the filing of the petition, which are unique for a termination of parental rights case and which provide for a difficult legal analysis, are discussed in detail below.

The child at issue, Cara,¹ was born in January 2003. She is the youngest child of Father and Mother's three children.² Her two older siblings, Anna and Brenda, live with Father in New York, New York.³

Mother and Father first met and began residing together in Clarksville, Tennessee in 1998. They resided in Tennessee until July 2002, during which time Mother gave birth to Anna and Brenda, their two oldest children. In July 2002, Mother and Father, along with Anna and Brenda, moved to Father's hometown of New York City. While Mother and Father resided together in New York, Mother became pregnant with Cara. However, Mother became unhappy living in New York, and so Mother and Father agreed that Mother, along with the middle child, Brenda, who was almost one year old, would return to Tennessee to live with the maternal grandmother, at least until she gave birth to Cara. In September 2002, Mother and Brenda traveled to Fentress County, Tennessee to reside with the maternal grandmother. Both Father and Mother testified that this was to be a temporary arrangement and that Mother, Brenda, and Cara were to return to New York to live with him and Anna.

Four months later, in January 2003, Cara was born. Following Cara's birth, Mother, Cara, and Brenda continued to reside with the maternal grandmother. Three months later, in April 2003, Mother and her two youngest daughters moved out of her mother's home to live with a man with whom she had recently begun a relationship. Thereafter, Mother, who had a history of drug abuse, began using drugs again and her drug abuse escalated over the next few months. Due to Mother's growing drug abuse, the maternal grandmother assumed full responsibility to care for Brenda and Cara in March 2005. When Father learned that Mother had abandoned their children, Father notified the grandmother that he would come get Brenda, who had special needs, and later return to get Cara. One week after being notified that Mother had abandoned the girls, Father took a bus from New York City to Knoxville, Tennessee where Mother's family met him at the bus station with both of the girls.⁴ Father stated that he agreed to allow Cara to stay with the grandmother in Tennessee for two reasons: he needed to make additional arrangements for housing to provide for three children, and the grandmother and Mother's sister, Mrs. W., stated they wanted to care for Cara until Mother got back on her feet. One of the reasons Father needed to make housing arrangements is that Brenda, the middle child, is a special needs child who has experienced severe physical and mental problems that required exceptional attention and support.

¹ Cara is a fictitious name we have given the child in order to maintain her anonymity.

² Mother and Father never married.

³ Anna and Brenda are fictitious names we have given to the oldest and middle child in order to maintain their anonymity.

⁴ It is undisputed that the only time Father saw his youngest daughter prior to the filing of the termination petition was the brief period of visitation at the bus station.

When Father arrived in Tennessee to get Brenda, who was then approximately four and a half years old, he stated that she could barely walk. When he returned to New York with Brenda, Father took her to several specialists, including a neurosurgeon and an orthopedist. She was diagnosed with physical deformities in her legs and feet, which required her to wear full leg braces for approximately two years; she was later fitted with a smaller brace. She also required physical therapy. Due to mental trauma, she had to be hospitalized several times and was seen by a psychiatrist once a week for ongoing treatment. During the first year she was with Father, he took her for two doctors visits each week as well as periodic physical therapy appointments.

Ever since March 2005, both Anna and Brenda have resided with Father and have been in Father's sole care and custody in his apartment in New York City. During this time Father was the sole provider and care-giver for Anna and Brenda, while Mother provided no support for Anna or Brenda; conversely, Father provided no support for Cara while she resided with the maternal grandmother or the petitioners.

In February 2006, the maternal grandmother determined that she could no longer care for Cara, so she asked Mother's sister, Mrs. W., to take Cara into her home and assume responsibility for caring for Cara. Although this too was intended to be a temporary arrangement, as the grandmother and Mrs. W. acknowledged at trial, Mr. and Mrs. W. have retained informal custody of Cara ever since February 2006.

During a phone conversation in May 2007, Mrs. W. informed Father that Mother intended to relinquish her parental rights. Father responded by telling Mrs. W. that he would come to Tennessee to get Cara and take her home to New York so that he, Cara, Anna, and Brenda could reside together as a family. Mrs. W. immediately informed Father "that isn't going to happen," and a few days later, on May 25, 2007, the Petition to Terminate Mother and Father's Parental Rights and to Adopt was filed in the Fentress County Chancery Court.

A trial was held on April 21, 2009, on the issue of terminating the parental rights of Mother and Father.⁵ Mother formally consented to the termination of her parental rights; she also testified in support of the termination of Father's rights and the adoption of Cara by Mr. and Mrs. W. At the conclusion of the trial, after stating its findings of facts and conclusions of law from the bench, the trial court granted the petition to terminate Father's parental rights on the grounds of abandonment by willful failure to support and abandonment by willful failure to visit, and on the finding that termination of Father's rights was in the best interest of the child. An order terminating Father's parental rights was entered on May 8, 2009. Father filed a timely appeal.

STANDARD OF REVIEW

Parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993). This right

⁵ There is no indication in the record for the delay between the filing of the pleadings and the trial.

is superior to the claims of other persons and the government, yet it is not absolute. *In re S.L.A.*, 223 S.W.3d 295, 299 (Tenn. Ct. App. 2006).

Parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). The petitioner has the burden of proving that there exists a statutory ground for termination, such as abandonment or failing to remedy persistent conditions that led to the removal of the child. Tenn. Code Ann. § 36-1-113(c)(1); *Jones*, 92 S.W.3d at 838. Only one ground need be proved, so long as that ground is proved by clear and convincing evidence. *See In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003). In addition to proving one of the grounds for termination, the petitioner must prove that termination of parental rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2); *In re F.R.R.*, 193 S.W.3d 528, 530 (Tenn. 2006); *In re A.W.*, 114 S.W.3d 541, 544 (Tenn. Ct. App. 2003); *In re C.W.W.*, 37 S.W.3d 467, 475-76 (Tenn. Ct. App. 2000) (holding a court may terminate a parent's parental rights if it finds by clear and convincing evidence that one of the statutory grounds for termination of parental rights has been established and that the termination of such rights is in the best interests of the child). Therefore, a court may terminate a person's parental rights if (1) the existence of at least one statutory ground is proved by clear and convincing evidence and (2) it is clearly and convincingly established that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

Whether a statutory ground has been proved by the requisite standard of evidence is a question of law to be reviewed de novo with no presumption of correctness. *In re B.T.*, No. M2007-01607-COA-R3-PT, 2008 WL 276012, at *2 (Tenn. Ct. App. Jan. 31, 2008) (no Tenn. R. App. P. 11 application filed) (citing *In re Adoption of A.M.H.*, 215 S.W.3d at 810).

ANALYSIS

The threshold issue in a termination of parental rights case is “whether the parent whose rights are at stake has engaged in conduct that constitutes one of the grounds for termination of parental rights.” *In re W.J.P.*, No. E2007-01043-COA-R3-PT, 2008 WL 246015, at *7 (Tenn. Ct. App. Jan. 30, 2008). In this case, however, it is apparent the trial court did not focus on this threshold issue; instead, the trial court applied an erroneous legal standard by engaging in a comparative fitness analysis – comparing Father with the proposed adoptive parents – to determine whether his rights should be terminated. The record also reveals that although the trial court articulated the applicable factors necessary to establish the grounds of abandonment, the trial court did not address or make any findings concerning the essential component of willfulness, specifically whether Father's failure to support and visit was “willful.” *See In re Audrey S.*, 182 S.W.3d 838, 863 (Tenn. Ct. App. 2005).

We begin our analysis by reviewing the trial court's ruling from the bench, which is quoted below in its entirety:

THE TRIAL COURT'S RULING

This is a question of fact more than law; the law is very clear in this state. It doesn't take a whole lot really to abandon a child. Four months continuous for any one period of time, intentionally not supporting, intentionally not visiting can be considered to be abandonment. We always mix all the facts in and try to do what the parties intended and what is right.

In this case we have a middle class white American family, [Mr. and Mrs. W.], not one word said against them. In fact, everything that everybody has said is that they are good Fentress County people; there is no reason for me to believe otherwise. [Father] is a New Yorker, and there is nothing wrong with that. He's an African-American; there is certainly nothing wrong with that. The children involved are mixed children, and sometimes they have problems created by stupidity and ignorance, but in this case apparently there is not much of a problem.

And contrary to what many people think about African-American fathers, [Father] does certainly appear to be a good father. This court knows of nothing bad he's done concerning his two beautiful daughters that have testified here today. They are bright, intelligent children; they are getting a good education under the circumstances they are under. [Father's] mother was a school teacher, his brother a policeman, they are a good family. There's good people in the family.

I don't agree that [Father] has to be proved an unfit father before I can terminate parental rights in the classic form. This case is not about [Father], and this case is not about [Mr. and Mrs. W.]. This case is about [Cara], who is six years of age and has lived her entire life in Fentress County. She's lived most of that life with her aunt and uncle. Her mother abandoned her while she was living with her grandmother. And admittedly so she was on drugs. [Father] had some drug problems back during that period of time that is apparently not prevalent now, and I'm not holding that. But we are here concerning a child that has lived here its entire life.

Back at the first of this lawsuit [Mr. W.] made a statement that I think.....two or three that I really was impressed with. One, was that this child was not a burden, that this child was a blessing. And [Father's] two daughters to him are a blessing. And he obviously understands that and obviously loves all of his daughters. But children are a blessing. But [Mr. W.] went further and said, when the little girl said, "I wish you were my father," and he said, "What do father's do?" What makes you a father? It's not the biology that we all know about. That doesn't make you a father. What makes you a father is being there payday, putting your money on the line, changing diapers, washing clothes, getting up in the middle of the night, and we all know what it takes to be a father. And in my opinion that's the answer to the

question. What do fathers do? They get up in the middle of the night along with the mothers. And those day-to-day things are what we must look at.

There's some hard facts in this case. There are some things that have been testified to that are not true. This cou[r]t finds some of this testimony to be not true.

This court doesn't agree with [Father's] conception of an agreement of some kind that he was leaving the baby with the mother until everybody got better and then they were going to get back together at some time in the future. That's not the testimony of anybody else. That child was just left here, and was subsequently left by the mother with her mother. And when she became unable to care for the child, left it with the aunt and uncle, who slowly over a period of time realized that their keeping this child was not temporary but had become a permanent thing. They had bonded. You don't bond with a child in thirty minutes. They had bonded with this child, and this child is the same as their other children. They became a little aggravated at [Father] along in the late part of this relationship, after they had this child for three or four years and they had bonded, and wanted to adopt and he wanted to take the child away.⁶ And that's pretty contrary positions.

But I think that the evidence is clear and convincing in this case beyond any question of a doubt that this child was abandoned shortly after birth by both its mother and its father.⁷ And has been for the last several years with the aunt and uncle who are the actual mother and father, and that a termination should be granted in this case.

This is a different case than most. [Father] and [Mr. and Mrs. W.] have become a little angry at each other in this trial. You've got . . . as they say, the lawyers have forty-eight hours to be mad at the judge and then they have to get over it. You all need to get over this. I'm not saying by that you don't take your appeal or do whatever you want to do with this court's opinion. But these girls should know each other. That's one of the few healthy things we have talked about. This child should become the child, if the adoption goes through, of the aunt [and] uncle. But this child should never be denied the right to see its father, who is not a bad person, and certainly should have a relationship with its sister, all four of its siblings if they desire to see it. But you can't take a child that has been in the situation that this child

⁶ While the petitioners had assisted the grandmother when she had custody of the child, the record clearly demonstrates that at the time the petition to terminate Father's parental rights was filed, the child had only been in their custody for fifteen months.

⁷ Contrary to this finding, the record demonstrates that Mother cared for the daughter for the first two years of her life.

has been in for six years and put it in an entirely new home.⁸ And you know, one of the things that just kind of came up by the way at the very end of this, and why you don't make these abrupt changes, is there is a stepmother involved - or a girlfriend of [Father] - and he's entitled to have a girlfriend if he wants to. She apparently lives with him and takes good care of these two girls. But she might . . . you know, I have absolutely no knowledge about her. There is nothing in the record that she is good, bad or indifferent. But I think when you have a steady family situation that we have here, this child is safe, she is doing very well here, I don't think it is in the best interest of that child that you tear it up and send it to a totally new environment with people who are in fact strangers to it. So that's my opinion. Anything else?

* * *

The above ruling, which was stated by the trial court immediately upon the conclusion of the trial, indicates that an erroneous legal standard was applied and that the trial court considered inappropriate factors. It is evident the court applied an erroneous standard – the comparative fitness standard – by comments expressed as reasons for terminating Father's parental rights. One of the first findings expressed by the trial court was a comparison of Father with the petitioners:

In this case we have a middle class white American family, the [petitioners], not one word said against them [the petitioners]. In fact, everything that everybody has said is that they are good Fentress County people; there is no reason for me to believe otherwise. [Father] is a New Yorker, and there is nothing wrong with that. He's an African-American; there is certainly nothing wrong with that.

The foregoing clearly reveals that the trial court erroneously compared the fitness of the petitioners to that of Father, and that the court considered inappropriate factors, specifically race. Father's race is irrelevant; what is relevant is that he is the child's father unless and until a ground has been established upon which his parental rights may be terminated and a finding that termination of his rights is in the child's best interest.

Further, prior to making a determination that grounds existed for terminating Father's rights, the court made two additional comparisons between Father and the petitioners. First the court stated:

“And contrary to what many people think about African-American fathers, [Father] does certainly appear to be a good father. This court knows of nothing bad he's done concerning his two beautiful daughters that have testified here today. They are bright, intelligent children; they are getting a good education under the circumstances they are under.”

⁸The trial court also appeared to factor in the years the child had been in the petitioners' custody while the litigation was pending. We find it important to note that at the time Father answered the petition to terminate, he also filed a counter-petition seeking custody of his daughter and maintained a present willingness to take custody of his daughter.

Shortly thereafter, the court considered Mr. W.'s fitness to be the father of Cara; as before, this was considered by the court prior to determining whether a ground existed upon which Father's rights may be terminated. The court stated: "Back at the first of this lawsuit [Mr. W.] made a statement that I think . . . two or three that I really was impressed with. One, was that this child was not a burden, that this child was a blessing. And [Father's] two daughters to him are a blessing."

The foregoing statements by the trial court, which were expressed during its assessment of whether grounds existed upon which Father's rights may be terminated, reveal the application of an erroneous standard and the consideration of inappropriate factors that the trial court obviously deemed to be important, but which were not relevant to the issue of abandonment. Considering the record before us, we have concluded that the trial court failed to apply the appropriate legal standards in determining whether Father abandoned Cara by willfully failing to support her or by willfully failing to visit her during the requisite time periods. We will therefore look to the evidence in the record to make our own determination concerning whether the evidence is sufficient to clearly and convincingly prove that Father abandoned Cara by willfully failing to support her or by willfully failing to visit her during the requisite time periods.

ABANDONMENT BY WILLFUL FAILURE TO VISIT OR SUPPORT

Abandonment may be found upon a showing by clear and convincing evidence that:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;

Tenn. Code Ann. § 36-1-102(1)(A)(i).

Failure to visit or support a child is "willful" when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so. *In re Audrey S.*, 182 S.W.3d at 864 (citing *In re M.J.B.*, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004); *Shorter v. Reeves*, 72 Ark. App. 71, 32 S.W.3d 758, 760 (Ark. Ct. App. 2000); *In re B.S.R.*, 965 S.W.2d 444, 449 (Mo. Ct. App. 1998); *In re Estate of Teaschenko*, 393 Pa. Super. 355, 574 A.2d 649, 652 (Pa. Super. Ct. 1990); *In re Adoption of C.C.T.*, 640 P.2d 73, 76 (Wyo. 1982)). "Where the failure to visit is not willful, however, a failure to visit a child for four months does not constitute abandonment." *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007). "[A] parent who attempted to visit and maintain relations with his child, but was thwarted by the acts of others *and circumstances beyond his control*, did not willfully abandon his child." *Id.* (citing *In re Swanson*, 2 S.W.3d 180, 189 (Tenn. 1999)) (emphasis added). Further, when considering the failure of the parent to support the child, we should determine "that the parent is aware of his or her duty to

support, *has the ability to provide support*, and has voluntarily and intentionally chosen not to provide support *without a justifiable excuse*.” *In re T.Z.T.*, No. M2007-00273-COA-R3-PT, 2007 WL 3444716, at *6 (Tenn. Ct. App. Nov. 15, 2007) (citing *In re M.J.B.*, 140 S.W.3d at 654) (emphasis added).

We must find this willfull abandonment by clear and convincing evidence, and, in order to be clear and convincing, “the evidence must be of the type ‘in which there is no serious or substantial doubt about the correctness of the conclusions drawn’ therefrom.” *In re T.Z.T.*, 2007 WL 3444716, at *3 (quoting *In re Valentine*, 79 S.W.3d at 546). “‘The use of a heightened standard reflects the importance of the public and private interests affected by an adoption’ and should invoke in the fact-finder’s mind a firm belief or conviction as to the truth of the allegations sought to be proved.” *Id.* (citing *O’Daniel*, 905 S.W.2d 182, 187-88 (Tenn. Ct. App. 1995), superseded by statute on other grounds).

As for the ground of abandonment, the trial court’s statement that “[i]t doesn’t take a whole lot really to abandon a child. Four months continuous for any one period of time, intentionally not supporting, intentionally not visiting can be considered to be abandonment,” suggests a failure to fully appreciate the significance of the essential element of “willfulness” in determining whether a parent has abandoned a child. The fact that the trial court made no findings concerning whether Father’s failure to visit or support Cara was willful is also suggestive of this fact. We also note that there is little, if any, evidence regarding whether Father willfully failed to visit or support Cara. To the contrary, there is evidence that Father depended on social security disability benefits to support Anna, Brenda, and himself, and evidence that Brenda presented an additional financial burden to him due to her special needs. Moreover, the evidence reveals that due to Brenda’s special needs, including weekly visits to doctors, travel for Father was challenging. Further, the evidence, which is disputed, suggests that Father believed the family was operating upon the understanding that he would care for Anna and Brenda, while they cared for Cara.

It is undisputed that Father did not visit Cara or provide financial support for Cara during the requisite period of time; however, proving that fact alone is not sufficient to establish the ground of abandonment. *See In re W.J.P.*, 2008 WL 246015, at *9 (citing *In re M.J.B.*, 140 S.W.3d at 655) (simply proving that a parent did not support a child or visit a child is not sufficient to prove abandonment). To prove the ground of abandonment, the petitioner must establish, by clear and convincing evidence, that the parent who failed to visit or support a child had the capacity to do so, made no attempt to do so, and had no justifiable excuse for not doing so. *In re Audrey S.*, 182 S.W.3d at 864 (citing *In re M.J.B.*, 140 S.W.3d at 654). Is an informal agreement among family members to allow one of the parents’ three children to live with another relative far away from home for an extended period of time, definite or indefinite, the type of “justifiable excuse” contemplated in *In re Audrey S.* or *In re M.J.B.*? Has the parent who sends a child away to a boarding school and does not visit that child for the requisite period of time abandoned the child? Consider the parent who permits his child who is in high school to be a foreign exchange student for a year in China. If the parent does not visit the child for the requisite period, has that parent abandoned the child? Consider the parent who agrees with other members of his family that one of his children should live with

other relatives for an extended period of time more than a thousand miles away in a different region of the country on the belief it is in the best interest of the child to do so. If that parent does not visit the child for the requisite period of time, has that parent abandoned the child in the context of the statute? Would it matter if that parent was a single parent, living on social security disability benefits, did not own a car, and was the sole provider for the child's two siblings, one of whom had special needs? We believe these factors are relevant when determining whether the failure to support or visit, in the context of the statute, was willful.

In this case, there is evidence, *albeit* disputed, that the family – Mother, Father, maternal grandmother, and maternal aunt – had an informal understanding that Father would care for Anna and Brenda, while the other family members cared for Cara. The record reveals that Father called to talk with Cara, that her sisters also spoke with Cara during these phone calls, and that these calls brought great joy to Cara. Moreover, Father sent gifts and cards to Cara for her birthday, Christmas, and on other occasions. He did not, however, send money for her support.

The foregoing notwithstanding, the petitioners had the burden to prove that Father was not only aware of his obligation to support Cara, but also that he had the capacity to provide support and that he did not have a justifiable excuse to not provide that support. *See* Tenn. Code Ann. § 36-1-113(c)(1); *Jones*, 92 S.W.3d at 838; *In re T.Z.T.*, 2007 WL 3444716, at *3. Father's main source of income was his social security disability benefit, which he relied upon to support the two daughters in his custody. Father was unable to receive social security benefits for Cara because she was not in his physical custody; however, he testified that he attempted to have her enrolled so the petitioners could receive the benefit to support Cara, but he was unsuccessful. The evidence is also undisputed that the petitioners never asked Father for support.⁹ *See Hickman v. Hickman*, No. E2000-00927-COA-R3-CV, 2000 WL 1449853, at *2 (Tenn. Ct. App. Sept. 28, 2000) (citing *Martin v. Martin*, No. M1999-00210-COA-R3-CV, 2000 WL 298247 (Tenn. Ct. App. March 23, 2000)) (finding the evidence insufficient for failure to support as there was no order requiring support, no request was made to provide support, the parent occasionally provided clothing and other items, and the petitioner failed to provide clear and convincing evidence that the parent intentionally failed to support).

Termination of a parent's rights is "a grave and final decision, irrevocably altering the lives of the parent and child involved and 'severing forever all legal rights and obligations' of the parent." *Means v. Ashby*, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003) (quoting Tenn. Code Ann. § 36-1-113(I)(1)). "Few consequences of judicial action are so grave as the severance of natural family ties." *Santosky v. Kramer*, 455 U.S. 745, 787 (1982). With full recognition of the gravity of this decision and considering the unique facts of this case, Father's limited financial resources, the burdens on him to provide for Cara's sisters, one of whom has special needs, and the informal understanding or misunderstanding among Father, Mother, the maternal grandmother, and especially the petitioners, we find the evidence in the record fails to establish by the requisite standard that

⁹ In fact, Mr. W. testified that he thought Father "probably had his hands full" as he was caring for the other two daughters, including the middle child who was experiencing physical and mental problems, and required extensive care.

Father's failure to visit or support Cara was willful, as that term is applied in the context of Tenn. Code Ann. § 36-1-102(1) and § 36-1-113(g)(1). *See In re Valentine*, 79 S.W.3d at 546) (stating the evidence must be of the type "in which there is no serious or substantial doubt about the correctness of the conclusions drawn" therefrom). In the absence of clear and convincing evidence that the failure to visit or support was "willful," there is no basis upon which to find either ground of abandonment under Tenn. Code Ann. § 36-1-113(g)(1). *See In re Audrey S.*, 182 S.W.3d at 863.

We, therefore, find that the record does not contain evidence to clearly and convincingly prove that Father abandoned Cara by willfully failing to support her or by willfully failing to visit her during the requisite time periods.

Having determined that the trial court applied the incorrect legal standard and that the petitioners failed to prove by clear and convincing evidence any ground upon which Father's parental rights may be terminated, the issue of best interests is pretermitted. *See* Tenn. Code Ann. § 36-1-113(c)(2). The order of the trial court terminating Father's parental rights is reversed and the Petition for Termination and Adoption is dismissed. *See In re A.M.H.*, 215 S.W.3d at 811.

IN CONCLUSION

The judgment of the trial court is reversed, and this matter is remanded with costs of appeal assessed against the petitioners/appellees.

FRANK G. CLEMENT, JR., JUDGE